Supreme Court, U.S.
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No. 01-1357

In The Supreme Court Of The United States

OHIO ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

v.

MICHAEL D. NIHISER,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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The State of Ohio seeks review of a Sixth Circuit decision that found that a Congressional enactment, 42 U.S.C. 2000d-7, acts as a "valid and unambiguous waiver" of Ohio's sovereign immunity from private Rehabilitation Act lawsuits. Pet. App. 6a. This is so, said the appeals court, because Congress intended for a waiver to result, and because the Ohio Environmental Protection Agency accepted federal funds.

The decision below squarely conflicts with this Court's decision in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999), for that case says that a State's waiver requires more than a clear statement from *Congress*, but instead requires a clear declaration of waiver *by the State*. *Id.* at 676, 680. Further, under *College Savings*, only an express waiver will do; the doctrine of so-called "constructive waiver" was abolished. In Ohio's view, the "waiver" that Ohio purportedly effected here—namely, "waiver by acceptance of funds"—is precisely the type of constructive waiver that no longer suffices. And Congress's purported "invitation to waive" was not even a clear notice to States to begin with, as Section 2000d-7's "shall not be immune" language was an attempt to abrogate, as this Court has repeatedly acknowledged. *See* Petition at 18, citing, *e.g.*, *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 72 (1992) ("In . . . 42 U.S.C. 2000d-7, Congress abrogated the States' Eleventh Amendment immunity under Title IX, Title VI, § 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975").

The United States responds that the decision below was correct, and it denies any conflict between the decision below and this Court's decisions. *See* Brief of the United States (U.S. Br.) at 5. These contentions are wrong, and the

United States' response shows why review here is warranted.

1. While Respondent denies any conflict with the Court's decisions, Respondent's primary approach to the key case—*College Savings*—is simply to ignore its holding. Respondent does not directly cite or acknowledge the parts of *College Savings* that Ohio discussed extensively in our Petition: the Court's requirement of a "'clear declaration' by the State of its waiver,'" *id.* at 680, and the Court's explanation of the "fundamental difference between a State's expressing unequivocally that it waives its immunity, and Congress's expressing unequivocally its intention that if the State takes certain action it shall be deemed to have waived that immunity." *Id.* at 680-81. Respondent does, of course, claim that Congress's statute is adequate, and that the State's acceptance of funds constitutes a clear agreement to waive, but it never aligns those assertions with the relevant *College Savings* rules. *See* U.S. Br. at 6-7.

Respondent's failure to align its arguments with the requirements of *College Savings* is telling, and the omission glares even brighter upon such an alignment. Respondent says that when "the State accept[s] federal money, then it is clear that it has agreed to the conditions as well." U.S. Br. at 6. This "agreement" is clear, says Respondent, because the State accepts funds in the face of a clear warning by Congress that, one way or another, Congress intends for recipients to lose immunity. *See id.* But this description of the Congress-State dialogue is uncannily similar to what the Court *rejected* in *College Savings* when it contrasted a true State declaration of waiver with "Congress's expressing unequivocally its intention that if the State takes certain action it shall be deemed to have waived that immunity." *Id.* at 680-81.

To bolster the proposition that accepting-funds-is-a-clear-waiver, Respondent cites the acknowledgement in *College Savings* that "Congress may . . . condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take, and . . . acceptance of the funds entails an agreement to the actions." U.S. Br. at 7, quoting *College Savings*, 527 U.S. at 686. But this language in *College Savings* was merely an acknowledgement that such a general principle was adopted in *South Dakota v. Dole*, 483 U.S. 203 (1987). In acknowledging that *Dole* generally allows Congress to purchase State action—including State actions other than an immunity-waiver, such as a change in substantive legislation—the Court surely did not undermine the more specific holding in *College Savings* that when Congress seeks to buy a waiver of immunity, only the utmost clarity will do.

Further, the *College Savings* passage cited by Respondent cites *Dole*, and that means that *Dole's* requirements for all Spending Clause legislation are triggered. *Dole* not only sets substantive limits, such as relatedness, but *Dole* also independently requires clarity in the State-Congress dialogue, as it requires that "if Congress desires to condition the States' receipt of federal funds, it must do so unambiguously, enabling the States to exercise their choice knowingly, cognizant of the consequences of their participation." *Dole*, 483 U.S. at 207. Here, Respondent holds up Section 2000d-7 as such an "unambiguous" Congressional statement, yet it argues that it "does not matter . . . whether Congress thought that Section 2000d-7 was a clear abrogation or clear notice that acceptance of funds will constitute waiver." U.S. Br. at 6-7. This is partly correct, in that Congress's *intent* alone does not matter—but what does matter is whether

Congress's words objectively manifested a clear notice to States that Congress was inviting a waiver, and whether the State then accepted that invitation with a "clear declaration" of waiver. *See College Savings*, 527 U.S. at 680. Respondent offers no express explanation of how to reconcile its "does not matter" suggestion, which allows that the statute may mean one thing or another, with the "unambiguous" requirement. Respondent's view seems to be that Congress can satisfy the clear statement rule with a clear statement of its "general intent" to remove immunity, without any clarity on its specific intent to do so by one path or another. But this Court has always insisted on a clear statement of abrogation, or a clear invitation to waiver, and has never blessed this either-or approach.[1]

2. Further, Respondent's (and the Sixth Circuit's) view of Section 2000d-7 as a waiver provision cannot be reconciled with this Court's repeated description of the Statute as an abrogation provision. *See* Pet. at 18; *Franklin*,

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[1] Respondent incorrectly asserts that this Court has previously denied petitions for certiorari in two cases that, according to Respondent, "present[ed] virtually identical legal claims." U.S. Br. at 6, citing *Arkansas Department of Education v. Jim C.*, 533 U.S. 949 (2001) (No. 00-1488), and *George Mason University v. Litman*, 528 U.S. 1181 (2000) (No. 99-596). While those two petitions involving Section 2000d-7 were denied, the claims were nowhere near "identical" to Ohio's, as those petitions did not challenge, as Ohio does here, whether Section 2000d-7 triggers a valid waiver under *College Savings*'s dual clear-statement requirements. Those petitions limited their challenges to Congress's Spending Clause power, as Ohio does in its second question presented here, but those petitions conceded the first issue. *See* Brief of the United States in 00-1488 at 9 ("Petitioner does not argue that Congress did not clearly express its intention in 42 U.S.C. 2000d-7 to condition the receipt of federal funds on the recipient's waiver of its Eleventh Amendment immunity to Section 504 suits"); Brief of the United States in 99-596 at 7 (same concession regarding Title IX suits).

503 U.S. at 72. While Respondent insists that it "does not matter" whether Section 2000d-7 is an abrogation provision or a waiver provision, Respondent never explains whether it now views the statute as a waiver provision across-the-board—so that it invites waiver rather than abrogates as to Title VI and Title IX, as well as for Section 504 of the Rehabilitation Act—or whether the provision now does simultaneous double-duty, acting to abrogate for Title IX while acting to "invite a waiver" for Section 504. The first view of course conflicts with *Franklin* and other cases (*see* Pet. at 18), while the second means that the statute, far from being unambiguous, operates on an ongoing basis with two meanings. This curious state of affairs warrants review.

3. The Court should also review Ohio's second question presented, which challenges Congress's power under the Spending Clause to extract a waiver-of-immunity, as to disability discrimination lawsuits, by virtue of providing environmental cleanup funds. Respondent incorrectly asserts that the power issue was not pressed below, when in fact Ohio argued the point to the Sixth Circuit before oral argument and before the panel decision, as well as in a rehearing petition. Ohio admittedly blended its constitutional-power argument into its statutory argument, but the argument's text leaves no doubt that Ohio grounded part of its argument in *Dole*, and in the *Dole* prongs of coercion and relatedness. Ohio cited *Dole*, *see* Supp. Brief at 15, and it quoted *Dole's* discussion of coercion, *id.* at 16, 18. Ohio cited the Eighth Circuit's decision in *Bradley v. Arkansas Department of Education*, 189 F.3d 745 (1999), overruled *en banc sub. nom., Jim C. v. United States*, 235 F.3d 1079 (8th Cir. 2000), *cert. denied*, 533 U.S. 949 (2001), and it distinguished the Fourth Circuit's decision in *Litman v. George Mason Univ.*, 186 F.3d 544 (4th Cir. 1999), *cert. denied*, 528 U.S. 1181 (2000). *Id.* at 19-20. Ohio also noted the relatedness

problem, quoting *New York v. United States* for the principle that "conditions must . . . bear some relationship to the purpose of the federal spending; otherwise, of course, the spending power could render academic the Constitution's other grants and limits of federal authority." *Id.* at 20, quoting *New York v. United States*, 505 U.S. 144, 167 (1992).

Thus, while the Sixth Circuit did not address the issue, and while it was not featured as prominently as other issues in the case, it was more than adequately preserved. And in any event, the constitutional concerns remain relevant to the statutory issue because they implicate the need to construe the statute, if possible, to avoid constitutional problems.

4. Respondent concedes that the Sixth Circuit erred "to the extent" that the opinion "can be read" to hold that a State agency's acceptance of funds triggers a waiver by the entire State, and not just the relevant agency. U.S. Br. at 23 n.10. Respondent insists that this conceded error has no consequence, as the appeals court's overly broad language is "at most dicta." *Id.*

But the Sixth Circuit itself has plainly treated its view of "statewide waiver" as a *binding holding*, not as dicta, as shown by a subsequent decision, which Ohio noted in the Petition (at 27-28), and which Respondent ignores. The court held in that case that it had already "concluded that Ohio unambiguously waived" its immunity in its *Nihiser* decision, so it allowed a Rehabilitation Act suit to go forward against Kent State University without any inquiry into whether that entity received federal funds. *Carten v. Kent State Univ.*, 282 F.3d 391 (6th Cir. 2002). This "statewide waiver" holding is important to *Dole's* coercion prong, because it is coercive to force a state to

forgo *all* federal funding to *all* agencies in order to preserve immunity for any one agency.

5. Finally, to the extent that cases such as *Grove City College v. Bell*, 465 U.S. 555 (1984), and *Lau v. Nichols*, 414 U.S. 563 (1974), do support, as Respondent argues, the notion that *Dole's* relatedness inquiry does not apply to anti-discrimination laws, that factor weighs in favor of review, so that the Court may resolve the seeming tension between those cases and the firm dictate of *Dole* that all Spending Clause legislation must satisfy the relatedness inquiry.

CONCLUSION

For the reasons above and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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